

## Report

# Negotiating the Nuclear Weapons Convention: With a Mind to Its Future Conclusion

Yasuhito Fukui

Associate Professor

Hiroshima Peace Institute, Hiroshima City University

## 1. Introduction

In this lecture, I would like to talk about negotiations toward a nuclear weapons convention (hereinafter referred to as “NWC”), which is expected to be held in 2017 at the headquarters of the United Nations in New York, in terms of the themes of human security and efforts toward nuclear abolition, while bearing in mind the future conclusion of such a treaty. Among the Panelists who make presentations today, I am the only one who has practitioners’ background as a former Foreign Service officer, I would like to touch upon the analysis on Japan’s position and the current circumstances surrounding the current discussion on nuclear disarmament. Sooner or later, these negotiations will be concluded and a treaty will be then opened for signature, I have a strong sense that it would be problematic if Japan, as the only nation to have suffered from atomic

bombing, were not able to obtain approval from the Diet to ratify the treaty which will be useful for total elimination of nuclear weapons. For this reason, even though this may be a little technical, after first of all reviewing Japan's position statement by presenting some cases relating to disarmament treaties to date, I would like to begin with some procedural matters that serve as the prerequisite for such negotiations and then substantial matters such as basic obligations and national application clause which demand for municipal law enactment in view of the conclusion of such a treaty, referring to the similar precedent cases in the field of disarmament treaty that may be supposed to be the principal issue of these matters.

Since today's symposium is aimed at the general public, I first lay out some fundamentals of international law making for NWC negotiations. Because disarmament measures seek to reduce weapons and the military, which fall within the realm of states' sovereignty, disarmament measures are sometimes undertaken voluntarily or unilaterally. Thus, these are always subject to security considerations and as we have seen, are largely undertaken in forms of a legally binding treaty which obliges States Parties to comply with them. Taking the case of negotiations of the Arms Trade Treaty (ATT) as the most recent example of a disarmament treaty, we can see that disarmament negotiations are not exceptional even where they are intended to regulate the transfer of ordinary weapons that are not considered to be high-priority when compared with nuclear weapons. Incidentally, the Vienna Convention on the Law of Treaties (hereinafter referred to as "VCLT") defines a treaty in this sense to mean "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and

whatever its particular designation.”

To begin with, the VCLT, which we could regard as the “basic law of treaties”, is important in terms of fundamental rules related to the treaty being discussed here. Accordingly, many of these rules that have become customary for treaties are codified by this VCLT. For example, even though the U.S. is not a signatory to the VCLT, it has complied with its state practice even under the provisional application rules of the New Strategic Arms Reduction Treaty (START). To cite another example, the VCTL defines a “negotiating State” to mean “a State which took part in the drawing up and adoption of the text of the treaty” (Article 2.1 [e]). It also sets out various provisions for specific procedures for formal participation in treaty negotiations, including that delegates should have full powers to represent the state in question. Treaty negotiations are held according to these rules. For some of you, this will be akin to “preaching to the Buddha”; however, just in case, I touch lightly on the procedures for adopting a treaty and endowing the legally- binding power. The adoption of the text of a treaty, reflecting the fact that it is difficult in practice for all participating states to agree in case of multilateral negotiations, as is provided for in Article 9.2 of the VCLT, which stipulates that “the adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.” Moreover, the way that the treaty is to be established as authentic and definitive is set out in Article 10 (a) as being “by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up” or “Failing such procedure, by the signature, signature ad referendum or initialing by the representatives of those States of the text of the treaty or of the

Final Act of a conference incorporating the text.” While you would notice that being a “State participating in the drawing up of the text treaty” occupies an important position in the treaty negotiations, the significance of at least *participating in treaty negotiations* is also evident.

Furthermore, once treaty negotiations are concluded, an expression of consent to be bound by a treaty will be given (that is, signature *ad referendum*, signature — in some cases this is all that is necessary — followed by ratification, acceptance, and approval). Since there are quite a few cases of the adoption of multilateral treaties by voting instead of consensus agreement, countries that regard the final form of the adopted treaty to be unacceptable, where not prohibited by the treaty itself, enter it with reservations.

Even where reservations are prohibited, it is still possible for a country to begin the process of consent to the treaty in question after making adjustments according to its interests with an “interpretive declaration” rather than a “reservation.” However, you may be familiar with the problem of how the abuse of substantial reservations in the area of human rights in some countries tend to dilute the effects of treaties. Conversely, states that do not agree to the treaty chose to remain as non-contracting parties.

I have explained the basic rules set out in the VCLT as a potential minimum standard for thinking regarding negotiating an NWC. However, since these points are indispensable for considering the future form of an NWC, I would like to return to them later in my lecture.

## 2. Japan’s Position on a Nuclear Weapons Convention

From here, I would like to examine Japan’s official position

as announced in relation to an NWC. Not only from remarks by Japanese representatives at international conferences but also in official statements made in the national Diet, such as those in official government replies and written answers to official questions enable us to know positions taken by the Government of Japan. Written answers to official questions, in particular, are decided upon by the Cabinet as formal answers to those who exercise the right to question the Cabinet as set out in Article 74 of the Diet Act. Accordingly, these are formulated under strict procedures after prior consideration by the Cabinet Legislation Bureau and thus are positioned as the government's official replies to the Diet — the executive branch under the tripartite separation of powers set out by the Constitution. Conversely, since oral responses in the Diet are delivered by the executive political officers of the competent government agency, these are accorded some latitude of discretion in that there are some lawmakers who do not answer in accordance with the prepared answer as much as they can in improvised ones.

Since the resolution on NWC negotiations was adopted by of the UN General Assembly, several relevant official questions have already been raised by members of the House of Representatives. Taking these in combination with previous questions related to the use (or prohibition) of nuclear weapons, we may observe that staking Japan's position vis-à-vis an NWC will not be easy for the Government such as the Ministry of Foreign Affairs (MOFA). MOFA, which bears responsibility for Japanese diplomacy, has various sections related to the NWC, including not only a department in charge of disarmament but also bureaus in charge of the security policies and so on. It is between these organizations that policy decisions are made consequent to adjustments being made to approvals and matters

related to the affairs under their jurisdiction. For this reason, I would like to draw your attention, for example, to Japan's addresses and voting attitudes at the First Committee of the UN General Assembly, which are consequent to comprehensive adjustments made in light of requests from security-related bureaus to position even the NWC within nuclear disarmament and nonproliferation systems based on the NPT so as to secure extended deterrence.

In addition, in the past few years, a National Security Secretariat has also been set up within the Cabinet Secretariat to coordinate Japan's security policies. Thus, initiatives such as the NWC are decided through a multilayered decision-making mechanism to the extent that they are directly linked to national interest. Accordingly, at the departmental level of the MOFA that is responsible for diplomacy pertaining to disarmament and nonproliferation, policy change is bound to be fraught with difficulties without fundamental change in the circumstances or political initiative as I am sure, we can well imagine. With that in mind, I would like to see what might relate to the NWC negotiations from recent official questions.

First, with regard to an NWC to ban the use of nuclear weapons, we have the example of a written answer to a question submitted by Hiroyuki Konishi, a member of the House of Councilors:

- \* Japan's basic position on nuclear disarmament is that in order to realize a world without nuclear weapons that is based on the accurate recognition of the inhumanity of nuclear weapons and a calm awareness of the harsh security environment, it is essential to take realistic and practical measures through cooperation between the world's Nuclear-Weapon-States (NWS) and Non-nuclear-Weapon States (NNWS).

- \* Japan opposed the proposed resolution after repeated careful examination because of the fact that given that the nuclear and ballistic missile development by the DPRK (Democratic people's republic of Korea) constitutes a serious and imminent threat to Japan's security, it was not consistent with Japan's basic position, as described above, and that it served to deepen schisms and promote antagonism between the NWS and NWS.
- \* As Foreign Minister Kishida responded at the Special Committee on the TPP (Trans-Pacific Partnership), while bearing in mind the need to firmly argue our position from the standpoint that in addition to the commencement of negotiations, as the only country to have been suffered from the wartime use of atomic bombs, it is also essential for Japan to participate in the negotiations working for cooperation between the NWS and NNWS. In any case, we wish to consider this further on the basis of future discussions on the details regarding how the negotiations will take place.

In addition, some lawmakers asked for detailed answers regarding the resolution on “the advancement of multilateral nuclear disarmament negotiations.” Leaving out portions overlapping with the above, the following example is a written answer given in response to questions by Mizuho Fukushima, a member of the House of Councilors:

- \* The resolution in question concerns the decision to enter into negotiations on the so-called Nuclear Weapons Convention in 2017 and completely differs from the resolution mentioned previously, which aimed at the legal prohibition of nuclear

weapons in a general form.

- \* As to whether to participate in the negotiations in question, as stated by Foreign Minister Kishida at the press briefing in question, for which the transcript is publicly available on the Ministry of Foreign Affairs website, “our future activities, including participation as well as non-participation, will be decided on the basis of future discussions on the details about how the negotiations will take place. In addition, while such consideration will take place at the level of the entire government while also looking carefully at trends among middle-powers countries such as Australia and Germany with whom we have been collaborating thus far, for myself [as minister], at this stage I believe that I would like to participate actively in the negotiations, to firmly argue our position as the only country which suffered from the use of atomic bombs from the standpoint of emphasizing cooperation between the NWS and NNWS.”
- \* As this government has made clear since long, we believe that the use of nuclear weapons, owing to their extraordinarily destructive and murderous power, is not consistent with the spirit of humanitarianism that serves as the ideological foundation of international law. We also believe that such nuclear weapons, which could have catastrophic consequences for humankind, must never be used again and that it is important to persevere in realistic and steady efforts at nuclear disarmament with the aim of realizing a safer world without nuclear weapons.
- \* The advisory opinion rendered by the International Court of Justice on July 8, 1996, has stated that the “threat or



use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law” but “that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake” despite this being generally at odds with the same principles and rules. As a government, we believe that we should take this opinion rendered by the International Court of Justice, the main judicial body of the United Nations, very seriously.

- \* The phrase in question, “an extreme circumstance of self-defense, in which its very survival would be at stake,” is one that must be determined according to individual and specific circumstances and is thus difficult to address in a categorical manner.
- \* It is our understanding that the contents of Annex 2 of the “Report of the Open-ended Working Group taking forward multilateral nuclear disarmament negotiations” in question were not necessarily discussed at the working group itself but represent a list of proposals by Member States of the United Nations, international organizations, and civil society actors participating in the working group. In addition, since there are no proposals by Japan, providing an answer is difficult given that the precise meanings of phrases such as “the use and threat of use of nuclear weapons,” “participating in nuclear war planning,” “participating in the targeting of nuclear weapons,” “permitting vessels with nuclear weapons in ports and territorial seas,” “permitting nuclear weapons from being transited

through national territory,” and “assistance, encouragement, and inducement” are not necessarily clear.

Furthermore, the following is an example of a written answer to questions regarding a prohibition on the use of nuclear weapons submitted by Takako Suzuki, a member of the House of Representatives.

- \* On the basis of the Three Non-Nuclear Principles, as a matter of public policy, Japan adheres to the principle of not possessing any nuclear weapons, including even the ones whose possession is not constitutionally prohibited. In addition, the Atomic Energy Basic Act. (Act No. 186 of December 19, 1955) stipulates that the utilization of nuclear energy will be limited to peaceful purposes. Furthermore, as a NNWS to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), Japan regards itself as being under an obligation not to receive the transfer from any transfer or whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices[u8] and considers itself not to be allowed to possess any nuclear weapons.
- \* On this basis, as a purely legal issue concerning the relationship between nuclear weapons and Article 9 of the Constitution, the government has traditionally taken the following view: Since Japan has an inherent right to self-defense, retaining the necessary minimum level of self-defense capability is not necessarily prohibited by Article 9.2 of the Constitution.

Accordingly, even if this were to involve nuclear weapons, as long as this remained within the bounds of such a limit, possessing such arms would not necessarily be prohibited by the Constitution. Conversely, the possession of nuclear weapons exceeding such a limit is unacceptable under the constitution. The same understanding is also held to be valid for the use of nuclear weapons. This was also the substance of the reply by Director-General Yokobatake of the Cabinet Legislation Bureau to the House of Councilors Budget Committee on the 18th of August[Author10], 2016.

- \* As a purely legal issue, it is understood that Article 9 of the Constitution does not necessarily prohibit the possession or use of nuclear weapons and that it obviously does not mandate their possession or use. Accordingly, the policy decision whether to possess or use nuclear weapon is not denied by the Constitution. Rather, it is on the basis of such a policy decision that Japan firmly adheres to the Three Non-Nuclear Principles and regards itself as being unable to possess any nuclear weapons under the terms of the Atomic Energy Basic Act and the Treaty on the Non-Proliferation of Nuclear Weapons. There is no problem of conflict to be discussed between the Constitution and the NPT as implied by the question.

From the above, in addition to the oft-repeated conventional explanation of Japan's stance and why it is unable to agree to the resolution, it is regarded as having been opposed by the emphasis of this resolution's difference from previous resolutions that cite its aim as being the legal prohibition of nuclear weapons in a general form. Partly due to the inherent character of official questions and written

answers, which, as I mentioned earlier, are unlike oral replies in the Diet insofar as they allow little scope for discretion, even if treaty negotiations were to be launched in the future, the future position statements by the Japanese government in the international arena can only respond on the basis of the line taken in written answers to official questions such as these. My concern is that even if we were to leave the search for a way of resolving the schism between nuclear powers and nonnuclear states in the international arena to other diplomatic actors, the gulf inside Japan between the Government of Japan and the civil society groups strongly interested in nuclear disarmament will grow even wider.

Given that the negotiation of an NWC is slated to begin whether Japan likes it or not, Japan should maintain a consistent foreign policy that is focused on disarmament and nonproliferation. Moreover, I think that most people understand that balancing this with national security considerations is bound to be difficult.

I do not consider that we are only asserting a safe opinion because we oppose the treaty. Rather, when the treaty is drafted as normal, I believe that Japan, even while facing various legal and political constraints, should begin to propose specific clauses that could stay the course in such a way that they could be called “Japan clauses” for Japan’s active participation in treaty negotiations in a visible way.

### **3. Procedural Issues (Decision-Making and Conditions for NGO Participation)**

Now I would like to discuss a few representative points concerning what is required from a procedural perspective in terms of a

consensus method and conditions for NGO participation in the consideration of a treaty prohibiting the use of nuclear weapons. Firstly, concerning procedural issues, I would like to offer my understanding of what is currently assumed from the wording of the treaty negotiation mandate resolution. Paragraph 10 of the text of the resolution (L. 41) by the First Committee of the UN General Assembly is as follows:

10. Decides that the conference shall convene in New York under the rules of procedure of the General Assembly unless otherwise agreed by the conference, from 27 to 31 March and from 15 June to 7 July 2017, with the participation and contribution of international organizations and civil society representatives.

Accordingly, unless decided otherwise, it is stated that the UN General Assembly Rules of Procedure shall apply and that proposals that do not fall under any of the important matters such as the approval of new member countries will be decided by “a majority of the members present and voting.” (N.B. The organizational session of the Conference, which was held on 16 February 2017, adopted its Rules of procedure.) We also see the view that it has become customary to practice a consensus approach with regard to nuclear disarmament as was insisted by Japan in the meeting of the working group.

However, the rules of procedure used for the NPT conference also stipulate rules that allow decision-making by voting (even though these have not been applied so far). As I recall, there was a case about ten years ago in which voting was suddenly used for the adoption of a Middle East resolution, which had traditionally

been adopted by consensus at the International Atomic Energy Agency (IAEA) General Conference. Nevertheless, where normally permitted by the rules of procedure, the possibility of voting cannot be excluded. Thus, the adoption by vote of the report adopted at the recent meeting of the working group falls within the scope conceived by the UN General Assembly's Rules of Procedure.

Another possibility is that disagreements between the NWS and NNWS will become more pointed in the future. If this were to become the case, the pursuit of consensus under such conditions could come to pose a psychological barrier for negotiators attempting to achieve certain conclusions. Accordingly, even at Review conferences of the NPT, we can understand the reason for not excluding the possibility of a resolution ultimately becoming subject to voting as permitted by the rules of procedure.

Even so, since the consensus decision making is explicitly stipulated in the rules of procedure for the Conference on disarmament and is, moreover, indirectly prescribed by reference to Article 8 of the Rules of Procedure for the Review Conference on the Convention on Certain Conventional Weapons (CCW), it is necessary for the question of whether to hold a meeting of government experts on lethal autonomous weapons systems (so-called LAWS) in 2017 to be decided by the consensus method at the meeting of the CCW Review Conference held in Geneva in December 2016..

Moreover, while conditions for the participation of NGOs are often a principal issue when negotiating rules of procedure, we may note that these are also written in a form such that their participation is explicitly permitted under the UN General Assembly's Rules of Procedure.

#### 4. Assumed Basic Obligations and Demands for Incorporation in Municipal Law

The treaties adopted by the UN vary widely, from voluminous conventions such as the UN Convention on the Law of the Sea (UNCLOS), which consists of 320 articles, to concise documents such as the Arms Trade Treaty (ATT), which features less than 30 articles. Further, as I mentioned at the outset in reference to the definition of “treaty” in the VCLT, they can appear under various names and sometimes comprise multiple documents. In terms of the NWC, while there have been various proposals, including a model convention proposed by Costa Rica on the basis of the Chemical Weapons Convention (CWC) and a preemptive ban type NWC considering a treaty along the lines of prohibiting the use of nuclear weapons, which is advocated by the International Campaign to Abolish Nuclear Weapons (ICAN), in view of treaty negotiations, it seems at the very least, necessary to conceive what kind of prohibition should be stipulated in the NWC about when or cut-off date for prohibition clause (i.e., temporal jurisdiction), where or place where to be prohibited for use of nuclear weapons (i.e., territorial jurisdiction), and how to prohibit the use of nuclear weapons and also about whom to prohibit.

However, as in the approach shown for written answers to official questions, the position of not entering into discussions by virtue of opposing treaty negotiations from the outset may be theoretically possible. However, what I want to emphasize is that even though the U.S. opposed the NWC and did not attend the working group meeting, when we look at the document issued calling on NATO member states to oppose this resolution, we can find a *prima facie*

evidence that careful consideration was given, including with regard to the kind of legal measures required by municipal law in case of an imposed obligation to prohibit the use of nuclear weapons, as well as the problem of their enactment.

In general Japan is, of course, a country that firmly incorporates the treaties into its municipal law for its national application at the time of conclusion. After negotiations of the NWC will be finished, then given Japan's status as the only country to have suffered from atomic bombing, we should avoid the situation where Japan will not be able to obtain the Diet's approval to conclude the treaty due to the fact that it will was not sufficiently reflected during the treaty negotiations, although the treaty is expected to contribute to nuclear disarmament and nonproliferation .

When an NWC will be concluded after future treaty negotiations, it would be thus necessary to secure the prohibition on the use of nuclear weapons by incorporating this within municipal legislation. Even if, as also described in the written answer to the official question that I presented earlier, "obviously [the Constitution] does not mandate their possession or use" given that the use of nuclear weapons is not possible on the premise of the Three Non-Nuclear Principles, it may be that prohibiting the use of nuclear weapons is not actually subject to penalty under current Japanese law.

For example, to implement the Comprehensive Nuclear-Test-Ban Treaty at the municipal law level, the revised Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors impose a penalty to secure the prohibition on nuclear explosions in Article 76.3, which stipulates that "Individuals who conducted a nuclear explosion shall be punished by imprisonment with work for not more than seven years. (2) Attempts to carry out the crime set forth



in the preceding paragraph shall be punished.” In this kind of text, whether this is a dual-liability formula intended to punish not only natural persons but also juridical persons that perform the same kind of action and whether this includes crimes subject to extraterritorial criminal provisions of the criminal code from the perspective of how this might apply to Japanese nationals who have used nuclear weapons overseas are questions that require further examination.

That said, the purpose of this law, as set out in Article 1 of the Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors is as follows:

This Act, in accordance with the spirit of the Atomic Energy Basic Act (Act No. 186 of 1955), is enacted for the purpose of providing necessary regulations on refining activities, fabricating and enrichment activities, interim storage activities, reprocessing activities and waste disposal activities, as well as on the installation and operation, etc. of reactors, while taking into consideration the possibility of large scale natural disasters, terror attacks, or other criminal acts, and also for the purpose of providing necessary regulations on the uses of international controlled material to execute treaties or other international agreements concerning the research, development and use of nuclear energy, in order to ensure that the uses of nuclear source material, nuclear fuel material and reactors are limited to peaceful ones, and at the same time, to ensure public safety by preventing hazards due to the event that a severe accident at a nuclear facility causes a discharge of an abnormal level of radioactive materials outside the factory or place of activity where said nuclear facility is installed, or otherwise resulting

from nuclear source material, nuclear fuel material, and reactors, and protecting nuclear fuel material, thereby contributing to protecting people's lives, health, and property, preserving the environment, and assuring national security.

Accordingly, where a prohibition on the use of nuclear weapons is not consistent with the objective of peaceful uses of nuclear energy as set out in Article 1 of the Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors, it is necessary for the prohibition on the use of nuclear weapons to be stipulated under municipal law by a separate independent piece of legislation.

Further, with regard to the case of self-defense within the scope allowed by Article 9 of the Constitution, it is much more difficult to understand a school of thought that considers that “since Japan has an inherent right to self-defense, retaining the necessary minimum level of self-defense capability is not necessarily prohibited by Article 9.2 of the Constitution. Accordingly, even if this were the case of nuclear weapons, so long as this remained within the bounds of such a limit, possession of such arms would not necessarily be prohibited by the Constitution.”

This is akin to the conclusion of the dispositive E2 of the International Court of Justice (ICJ) advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, in which the ICJ states that “it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.” This way, if a prohibition on the use of nuclear weapons falls within the scope of self-defense, it could be interpreted as being not a legal question but merely a policy choice. Since we are all familiar

with the terrible consequences of the use of nuclear weapons, after conducting sufficient comparative balancing vis-à-vis security considerations, it is necessary to minimize the range of any exception to such prohibition as much as possible.

Most multilateral treaties are devised to promote their universalization after adjustments to the interests of the countries concerned even though the methods by which this is accomplished are more often than not denigrated as “loopholes.” Nevertheless, to the extent that we can tolerate the range of reservations and exemption clause I mentioned at the beginning, it is necessary to create treaties in a way such that as many countries as possible can become party to them, ensuring the effectiveness of the prohibition and regulation.

As a practical problem, it is actually difficult to secure the implementation of treaties concluded by Japan in areas on Japanese territory that are not under the jurisdiction or control of the Japanese government, in particular, places such as overseas diplomatic establishments or U.S. military bases stationed in Japan. For example, it is not easy to respond to violations of basic obligations occurring in facilities or areas belonging to U.S. forces stationed in Japan, which are not controlled by a country that is not even a State Signatory of the Anti-Personnel Land Mines Convention or the Convention on Cluster Munitions (CCM). This is because, strictly speaking, non-State party that have not expressed consent to these treaties are not subject to any legal obligation, and this does not therefore constitute a violation thereof.

Thus, even more than the abstract conceptual level of extended deterrence, the extremely difficult challenges of ensuring consistency with the relevant provisions of the Japan—US Security Treaty and so

on wait at a more practical level.

A recent disarmament treaty, the CCM, Article 21 of the CCM to be precise, concerns countries that are not parties to the convention (particularly those such as the U.S.), works to resolve contradictions while encouraging participation in the form of a provision that “in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.” Of course, as to the extent to which exceptions are permitted by such an exemption provision, there might be the views that this may create loopholes, in other words, this is difficult to accept.

## 5. In Conclusion

In order to develop the discussion of the NWC found in *Naze kaku wa nakunaranai no ka II* [Why We Can't Eliminate Nuclear Weapons 2] (Hōritsu bunkasha, 2016), I have written that we need to clarify the legal interests that would be protected by a legal prohibition on the use of nuclear weapons. This is because, keeping in mind not only treaty negotiations but also the future conclusion of such a treaty by Japan, it will be necessary to secure such a treaty with legal penalties for its national implementation. Moreover, on the basis of the legal doctrine of *nulla poena sine lege* (“no penalty without a law”), it is also incumbent on us to clarify the definition and definite semantic scope, as well as the necessity, of what constitutes a “prohibition on the use of nuclear weapons.”

Regarding these protected legal interests, a precedent studies has attempted to present four forms of protected legal interest on the

basis of the concept of interest (infringement/compromise) in the terms, for example, of protective legitimacy and criminal law theory.

That is, as specific examples, it cites (1) that which constitutes the core of personality and protects the core essentials of life and body, (2) that which a person finds desirable even if this is also a personal interest, (3) interests (e.g., property rights) and things constituted as societal or public matters (e.g., environmental protection) that are only protected by law insofar as they belong to individuals, and (4) national protected interests.

Even though this is no more than a theory in the field other than criminal law in general as it relates to the negotiation of the NWC, it is also suggestive with reference to discussions of any prohibition on the use of nuclear weapons. We cannot simply begin and end by regarding a prohibition on their use as the natural consequence of the inherent inhumanity of nuclear weapons. Rather, I believe that we need to ensure a secure theoretical grounding that also includes such legal aspects.

I am afraid that I have set out the foregoing discussion rather roughly; however, the points to be discussed in the treaty negotiations are the issues of definition, basic obligations, relationships with other international conventions including the UN Charter, national implementation, decision-making bodies such as the Conference of the States Parties, a dispute resolution clause, and final provisions such as the requirement for entry into force, and it will be necessary to first consider how typical provisions should be provided for in such a treaty.

Furthermore, if Japan wishes to serve in an intermediary role, it will be necessary to steer the discussion after looking carefully at the respective trends of each country. In future, after examining such

details, since it is fine for Japan to contribute only in areas where its strengths lie and in ways that will not damage its national interests, its contribution may be expected in the form of the proposal of concrete wording for working documents.

In addition, the NWC is a treaty concept that concerns the entire field of international security, including disarmament. Therefore the Government of Japan as a whole should seek what is called for is a truly “realistic and practical” response. Since international law (the Law of Nations) is what basically regulates relationships between states, we need to ensure that the country, i.e., the government—does its best. However, in part because the resolution mandating treaty negotiation is premised on participation and contributions from international organizations and civil society, I believe that it is incumbent on university officials like us to participate, in a good way, by helping to produce knowledge while maintaining an appropriate wariness of, and distance from, the government as members of civil society. Thank you very much for your attention.

\*This translated version was revised on June 1, 2017.